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10-1-1979

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### Recommended Citation

Deborah Seidel Chames, *Judicial Review of Unilateral Treaty Terminations*, 11 U. Miami Inter-Am. L. Rev. 601 (1979)  
Available at: <http://repository.law.miami.edu/umialr/vol11/iss2/22>

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RECENT CASE  
JUDICIAL REVIEW OF  
UNILATERAL TREATY TERMINATIONS

*Senator Barry Goldwater v. James Earl Carter*  
Civil Action No. 78-2412

In the nation's almost two hundred years of constitutional history, no Court has ever had occasion to rule directly on the respective roles of the government's two political branches in the process of treaty termination. However, on December 15, 1978, the President gave notice of the termination of the Mutual Defense Treaty between the United States and the Republic of China (ROC or Taiwan). The treaty had been in effect since March 3, 1955, when it was approved by the Senate and ratified by President Eisenhower. The unilateral termination of the treaty by President Carter gave rise to the present suit.

The Plaintiffs (Senators) fell into two categories: those Senators who were members of the Senate at the time the Mutual Defense Treaty was submitted to the Senate for its advice and consent; and those Senators and Congressmen who were currently members of the United States Senate and United States House of Representatives, respectively. The Plaintiffs challenged the procedure by which the right of treaty termination should be accomplished.

The Defendants (Executive Branch) were President James Earl Carter and Secretary of State Cyrus Vance, who were being sued in their official capacities. The President was being sued for failure to seek the advice and consent of the Senate, or the approval of both Houses of Congress, in the unilateral termination of the 1954 treaty with the Republic of China. Secretary Vance was joined as a Defendant for aiding the President in the termination of the 1954 Defense Treaty. At issue in the case was whether the Plaintiffs were entitled to a declaratory judgment and injunctive relief as a result of the President's unilateral termination of the 1954 Mutual Defense Treaty.

The Executive Branch moved to dismiss or in the alternative for summary judgment; they contended that the Senators lacked standing, and that the suit presented a political question, thereby making the case nonjusticiable for review. The Senators refuted same and filed a Cross Motion for Summary Judgment, contending that the Court had subject matter jurisdiction. The Defendants filed a Brief in Opposition to Plaintiffs' Cross Motion for Summary Judgment. The Plaintiffs then submitted a Reply to Defendants' Opposition to Plain-

tiffs' Cross Motion for Summary Judgment. On June 6, 1979, the United States District Court for the District of Columbia ordered that the complaint be dismissed, without prejudice, for lack of standing. Thus, the Senators were given the option of bringing the issue before the Court at another time.

The Court first addressed the standing issue. In its memorandum opinion, the Court explained that several decisions of the United States Court of Appeals for the District of Columbia expressed the view that when issues of both standing and political question are to be considered, the standing issue should be resolved first. The standing claims in this case were presented by Congressmen. The Court, citing *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977), stated that there were no special standards for determining Congressional standing questions. Thus, the inquiry to be conducted in analyzing the injuries and interests of the Congressmen was the same as that for any other Plaintiff. In order to satisfy the two-prong standing requirement, a Plaintiff must allege: (1) an injury in fact; and (2) an injury that can fairly be traced to the challenged actions of the Defendant. Paragraph thirty-four of the Senators' Complaint set forth the allegations of injury on which they based their standing argument.

The Senators sought, in bringing this action, to maintain the effectiveness of their voting power and to prevent the circumvention of their role in treaty termination, the existence of such a situation being tantamount to their disenfranchisement. The injuries they alleged may be divided into two categories, representing the two types of Plaintiffs seeking relief in this suit: (1) those Senators who are current members of the Senate, but who were not members in 1955, alleged that their constitutional right to vote, and their right to give advice and consent with respect to the termination of the 1954 Treaty was denied by the President's unilateral action; and (2) those Senators who were members of the Senate during 1954-1955 alleged the aforementioned injury, and in addition, sought to preserve the effectiveness of their initial votes.

In order to meet the burden for demonstrating standing, the Senators relied heavily on *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), where the District Court of Columbia ruled that a Senator's vote established a right that a bill become law, unless vetoed by the President. A presidential pocket veto stripped Senator Edward M. Kennedy's vote of its effect, and denied him the further opportunity of overriding the Presidential action through a Congressional procedure. While President Carter's unilateral act of treaty termination did not deny the Senators and Congressmen their right

that a bill *become* law unless vetoed, it did deny the tenured Senators their right that the treaty *continue* as law. This may be the crucial distinction between the standing allegations in *Kennedy* and the case at bar. The current members of the Senate lack this element of standing entirely, since they did not vote on the Treaty initially. Both groups of Senators, however, like Senator Kennedy, alleged that they were denied any opportunity to override the treaty termination.

The Senators further alleged standing to seek judicial review of the Executive circumvention of Section 26 of the International Security Assistance Act of 1978. This is known as the "Dole-Stone Amendment" and reads in part:

It is the sense of the Congress that there *should be* prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.

The Senators alleged further injury by virtue of the fact that they were compelled to consider and act upon remedial legislation designed to reduce the effects of the executive action.

In order to invoke the subject matter jurisdiction of the Court, the Senators asserted that the issue of whether the Constitution required the consent of Congress or the Senate for treaty termination, or notice resulting in such termination, is a judicial rather than a political question. They relied on *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for the proposition that "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

The Senators set forth a compelling constitutional and historical argument as to the issue of unilateral treaty termination. They contended that it was not the intent of the framers of the Constitution to allow the President to unilaterally terminate treaties. Furthermore, the Senators alleged that their right to be consulted regarding treaty termination was implicit in their power to enact statutes and treaties (Article II, Section 2, Clause 2). The Senators also asserted that the constitutional requirement of checks and balances was necessary, even in the area of foreign relations. They maintained that both the enactment and the termination of treaties constituted policy-making legislative acts.

The Senator's primary argument was an historical one. They argued that the unilateral treaty termination instigated by President

Carter was unprecedented in American history, and distinguished the twelve instances where past presidents unilaterally terminated treaties as emanating from completely dissimilar factual bases than those circumstances surrounding the termination of the Mutual Defense Treaty with Taiwan. History established an accepted method by which the United States could terminate treaties with foreign nations, namely, by Presidential action in conjunction with the action by the Senate or Congress. This is so even in instances where the treaty contained notice provisions, such as those found in Article X of the Mutual Defense Treaty with the Republic of China.<sup>1</sup> Thus, the Senators maintained that President Carter's action established a dangerous precedent.

Finally, the Plaintiffs argued that an evil greater than multifarious pronouncements would be the nullification of Congress' constitutionally-prescribed role in treaty termination. Although there is express constitutional language as to the Senate's role in treaty making (Article II, Section 2, Clause 2), there is no express provision for treaty termination which includes the Senate or Congress. The Senators were concerned that if this unilateral act of treaty termination by the President remained unchallenged, they would be eliminated from the process of treaty termination altogether. Such a situation would seriously affect the system of checks and balances in the area of foreign relations.

The President, on the other hand, argued that the Senators failed to allege: (1) a demonstrable injury in fact; or (2) any personal stake in the controversy, and contended that this failure precluded the senators from invoking the power of the judiciary to substantiate their rights. The purpose of the standing requirement, according to the President, was stated in the fundamental case of *Flast v. Cohen*, 392 U.S. 83, 95 (1968), in the following terms: "[To] limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

The Executive Branch contended further that the Senators failed to suffer any immediate or automatic injury as did the Plaintiff in *Kennedy*. The President's pocket veto, in *Kennedy*, directly and immediately nullified Senator Kennedy's vote. However, in the instant

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1. Article X of the Mutual Defense Treaty of 1954 states: "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."

case, the President's unilateral treaty termination occurred some twenty-four years subsequent to the Senators' votes. The Senators countered that although the President's unilateral treaty termination did not immediately follow the 1955 vote, his unilateral action did cause the direct and immediate injuries at issue.

In the Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, they contended that the Court did not have subject matter jurisdiction because the facts indicated that the suit presented a political question, for the courts have traditionally declined to adjudicate issues involving the allocation of political powers in the area of foreign relations. To substantiate their position, the Executive Branch relied on the Supreme Court cases stating that executive decisions as to foreign policy are political, rather than judicial in nature. The President cited, for example, the Supreme Court case of *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974), for the proposition that "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party."

In order to defend his action of terminating the treaty with Taiwan, the President relied on his exclusive power to recognize foreign governments, found in Article III, Sections 2 and 3 of the Constitution. The President maintained that the Peoples' Republic of China (PRC) stipulated that termination of the Mutual Defense Treaty with Taiwan was a condition precedent to the normalization of relations between the United States and the PRC, thus necessitating his action under this provision. This contention, however, is factually debatable, as evidenced by the conflicting affidavits of Eugene V. Rostow, Professor of Law at Yale University Law School, and Warren Christopher, the Deputy Secretary of State.

Such considerations are peripheral to the matter at hand, however, since the issue before the Court was not whether termination of the Mutual Defense Treaty was necessary in order to normalize relations with the PRC, but rather the legality of the procedure used to terminate the treaty. The President insisted that because he alone can give the formal notice of termination, he alone possesses the power to make policy decisions as to the termination of treaties. Finally, the President proffered an historical argument, citing twelve examples of previous unilateral terminations by Presidents of the United States.

The President claimed that special circumstances surrounding the Mutual Defense Treaty itself granted him authority to unilaterally

terminate the treaty. These factors were fourfold: (1) the termination was effected pursuant to a specific notice provision which contained no limitation on the President's traditional authority; (2) the notice was given incident to the President's recognition powers; (3) the treaty was one involving defense, and thus represented the exercise of the President's Article II authority as Commander-in-Chief; and (4) the treaty was not self-executing and had no impact on domestic law.

The Court concluded that the Plaintiffs lacked standing, basing their opinion on the availability of alternative political means to address the executive action. The Court indicated that the political arena is the usual forum for legislators seeking to vindicate derivative constitutional rights. If the Senate or the Congress had rejected the President's notice of termination, or asserted a right to participate in the treaty termination process, the Court would then be confronted with a clash of the political branches in a posture suitable for judicial review. The Court suggested that the Senate, or Congress as a whole, utilize the legislative process to assert its right and demonstrate that it possesses a shared power with the President to act in terminating a treaty. According to this criteria, the Senators did not establish the requisite injury for standing.

In addressing the issue of injury under the "Dole-Stone Amendment," the Court held that the nonmandatory language of the Amendment prevented it from effectively resolving the question of how much consultation would meet the terms of the Amendment if it were binding. Therefore, the Senators failed to state a claim upon which relief could be granted by alleging injury under this section.

Because the Court dismissed the case on the standing issue, it did not expressly determine whether the issue before it presented a political question. However, it noted that resolution of the ultimate issue in this case should, in the first instance, be in the legislative forum. At the time this case was pending before the Court, three resolutions dealing with the same issues were pending before Congress. The Court felt that if Congress, through any of these resolutions, were to approve the President's action, it would moot the case. It took the approach that only when Congress takes action that falls short of approving the President's unilateral treaty termination is a controversy ripe for a judicial declaration respecting the President's authority to act unilaterally. Thus, the Court implied that it was of the opinion that the Senators did not present a political question, which would bar judicial determination of the issue. Rather, the Senators were held to have presented a question which was not, as yet, ripe for judicial review.

Comments as to the merits of the case are unusual once a court has decided to dismiss a case on the basis of standing. Nevertheless, the District Court made statements which implicitly indicated its position on the merits, despite the fact that it had dismissed the case on a threshold issue. The Court stated that it believed that the power to terminate treaties is a power shared by the political branches of government, namely, the President and Congress. The Court was inclined to agree with the Senators' assertion that the power to terminate the 1954 Mutual Defense Treaty was a shared power to be exercised by the action of both political branches.

It is important to recognize that the Court chose to rule on the issue of jurisdiction over the subject matter instead of deciding the issue on the merits. Federal courts often refuse to exercise their jurisdiction in this manner when they are confronted with sensitive disputes between the two other branches of government. In addition, it is a fundamental principle of constitutional adjudication that courts attempt to refrain from ruling on a constitutional issue where possible. The case at bar was doubly troublesome in that it not only presented a sensitive constitutional issue involving the balance of power between branches of government, but involved foreign policy considerations as well. The courts have always deferred to decisions of the executive branch in the area of foreign policy. The judicial branch is loathe to substitute its judgment for that of the executive because inconsistent multifarious pronouncements in an area as sensitive as foreign relations could cause embarrassment to the United States in the international sphere under circumstances which present "an unusual need for unquestioning adherence to a political decision already made." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Courts are generally concerned with the dilatorious effect that inconsistent multifarious pronouncements will have in the area of foreign relations and therefore, will only rule on the merits of foreign relations issues when it is absolutely essential and cannot be avoided. Furthermore, courts try to avoid issues which promote intra-governmental discord.

The Court may not postpone consideration of the merits merely to avoid a confrontation with the other two governmental branches and to dispense with making a constitutional decision. However, by first considering the question of standing, courts are relieved from making unnecessary constitutional determinations. It is essential, when the court rules on the merits, that the parties before it are true adversaries—thus, the requirement of standing. Standing ensures that the issues brought before the court will be sharpened for review so that the court may make a just determination. The parties must



have a legal right to sue in order for there to be true conflict. Thus, it is crucial to note in the *Goldwater* decision that the Court commented on the merits as well as on whether the issues presented a nonjusticiable political question, despite its holding that the Senators lacked standing. These comments imply that the Court considered the issues justiciable for review but were prevented from ruling expressly because of the Senators' lack of standing.

Following the Court's Order, the Senators filed a Motion to Alter or Amend the Judgment of June 6, 1979. In their brief, the Senators informed the Court that subsequent to publication of the Court's decision, they voted to adopt the "Byrd Resolution" by a vote of 59-35. The Byrd Resolution states: "That it is the sense of the Senate that approval of the United States is required to terminate any mutual defense treaty between the United States and another nation." 125 CONG. REC. 7038, 7039 (1979). Senate approval of the Byrd Resolution demonstrated the Plaintiffs' claim to shared power in the area of treaty termination. The Senators hoped that this vote would satisfy the criteria elucidated by the Court for the Senate to "assert a right to participate in the treaty termination process." Memorandum Opinion at 9. In addition, the Senators informed the Court that no amendment had been introduced in the Senate specifically approving the President's action in unilaterally terminating the treaty with Taiwan.

The Senators contended that they had standing on the basis of the Senate vote on the Byrd Resolution. The President's efforts to add a clause to the resolution, including an endorsement for unilateral Presidential action to end *any* treaty—including the Mutual Defense Treaty—with a notice provision, was defeated. Article X of the 1954 Mutual Defense Treaty. The Senators indicated to the Court that unless judicial action was taken quickly, the Senators' right to exercise their power in treaty termination might be irreparably lost by January 1, 1980, for the issue of the termination of the 1954 Mutual Defense Treaty would moot the case at bar. The Senators indicated that their injury could not be redressed through political channels. They insisted that, pursuant to Federal Rule of Civil Procedure 57, they were entitled to a declaratory judgment, as it was the proper form of relief where no effective alternatives are available.

The President maintained that the Senators lacked standing and argued that even if the case went to the merits, it would fail to state a claim upon which relief could be granted, for according to the terms of the Mutual Defense Treaty with Taiwan, the President had the

constitutional authority to terminate the treaty. The President further asserted that the Senate vote adopted the Byrd Amendment in place of the Foreign Relations Committee version which inserted substitute language recommended by the Committee on the basis of its hearings. 125 CONG. REC. 5018 (1979). Therefore, the President stated that the Senate vote did not meet the Court's requirement of asserting "a right to participate in the treaty termination process."

The major significance of this case is the insistence by the Senators on maintaining the balance of power between the executive and legislative branches of government in the area of treaty termination. It was an effort to uphold the system of checks and balances in the field of foreign relations, as well as to establish the Senators' constitutional right to participate in treaty termination decisions. Although the Court did not rule on the merits, its comments sufficiently indicated that it concurred with the Senators. At present, the question of congressional standing in the area of foreign relations has not been reviewed by the Supreme Court. If the Senators choose to appeal the Court's June 6, 1979 Order, the Supreme Court may be confronted with such an issue. For the first time, a United States Court has had the opportunity to rule directly on the respective roles of the two political branches in the process of treaty termination. The *Goldwater* decision is significant for this reason, regardless of the ultimate solution.

#### ADDENDUM

On October 17, 1979, the United States District Court for the District of Columbia granted the Plaintiffs' Motion to Alter or Amend the decision of June 6, 1979. Pursuant to this Order, the President's notice of termination must receive the approval of either two thirds of the Senate, or a majority of both houses of Congress, in order for it to be effective. In addition, the Secretary of State was enjoined from taking any action to implement the President's notice of termination until that notice is approved. In issuing this Order, the Court indicated that the vote taken in the United States Senate to adopt the Byrd Amendment constituted an injury in fact to the Senators—the necessary element to confer standing. The Court no longer feared that a decision on the merits would circumvent or evade the legislative process.

The Court proceeded to determine the necessary governmental action required by the Constitution to terminate the 1954 Mutual Defense Treaty with Taiwan, and concluded that the termination of a treaty involves a repeal of the "law of the land" established by the agreement. It

is in this area that Congressional participation is required. Furthermore, it is undisputed that the President must submit an amendment to the terms of *any* treaty to the Senate for its advice and consent. Therefore, if the lesser power to amend treaties is denied the President, *a fortiori*, the greater power to annul should also be denied. Treaty termination is thus deemed to be a shared power which cannot be exercised by the President unilaterally.

A notice of appeal has been filed by the government in the Court of Appeals for the District of Columbia.

DEBORAH SEIDEL CHAMES